Central Law Journal.

ST. LOUIS, MO., JULY 10, 1903.

IS A NEWSPAPER ENTITLED TO COPYRIGHT?

A question of much interest and some discussion at the present time exists as to the right to copyright a newspaper. At common law all literary property is protected to the extent only of possession and use of the manuscript and its first publication by the owner. With voluntary publication the exclusive right is determined and the statutory copyright is the sole dependence of the author or owner for a monopoly in the future publication. The right of literary property, of course, exists as to any and every product of the individual's brain. No man can snatch from another his unpublished conceptions of any kind. Of such he has a monopoly at common law that knows no limitation as to time. Upon the publication of such conceptions, however, the common law withdraws its protection, because at that moment the author is supposed to have enjoyed the full fruition of his labors. This supposition, as a general rule, is not a violent one, as the intellectual conceptions and literary products of the great majority of men have value and are paid for generally at the time of publication. When, however, the particular product of the brain, is of some permanency and is likely to have a value for some years to come, the desire of the author is to enjoy a monopoly of its publication. Whether he may enjoy such a monopoly will depend not upon the common law but upon the statute.

The statute extending copyright protection to authors was passed by congress under and by virtue of Sec. 8, Art. 1 of the constitution: "Congress shall have power to promote the progress of science and useful arts, by securing for limited times *to authors* and inventors the exclusive right to their respective *writings* and discoveries." The section of the statutes, regulating copyrights, which enumerates the various kinds of subject-matter entitled to copyright is section 4952 of the the Revised Statutes. This section provides that "the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, shall upon complying with the provisions of this chapter, have the sole liberty of printing, etc." Under this language, if at all, must authority be inferred to copyright any literary production. Whether a newspaper comes within this designation is a doubtful question. Before discussing the authorities the writer will here set forth a communication, dated June 27, 1903, from the United States Register of Copyrights in reply to a request for information as to the practice of the department in regard to newspapers. Mr. Solberg writes:

> Dear sir:—I beg to acknowledge receipt of your letter of June 22d, asking in regard to the extent of copyright upon newspapers and to reply thereto. As you are doubtless aware, the copyright office is purely an office of record, and it could give no authoritative opinion upon a matter such as this which you raise, which is even now before the courts, and, as you intimate, is not uniformly determined even by the courts themselves. Perhaps it may be of some use to you, however, to explain that newspapers and periodicals are registered in the copyright office for copyright protection under the theory that they are reasonably considered to be books. In fact, until the word "periodical" was used in the Copyright Amendatory Act of March 3, 1891, the titles of all periodicals and magazines were invariably registered under the designation "book or periodical." As, however, the copyright act cited above so distinctly uses the term "periodical," a separate series of record books has been made to contain the periodical entries, it being a matter of convenience to get all the titles of periodical entries together in this way. The title of each issue of a periodical is registered to identify that issue, and such registration of title, followed by compliance with the further statutory formalities—deposit of copies and printing the notice of copyright—is supposed to secure protection upon so much of the contents of the periodical as is subject to copyright protection, exactly as in the case of a book. It is to be supposed, however, that in each issue at least of a newspaper there would be a larger portion of matter not strictly subject to copyright protection than would be the case in relation to a book.
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> THORWALD SOLBERG.
> Register of Copyrights.

The amendment of March 3, 1891, to which this letter refers provides as follows: "That for the purpose of this act each volume of a book in two or more volumes, when such

volumes are published separately, and the first one shall not have been issued before this act shall take effect, and each number of a periodical shall be considered an independent publication, subject to the form of copyrighting as above."

Having thus informed ourselves of the extent to which the statutes and the practice of the copyright office goes, our next subject of inquiry is the construction of the copyright act by the courts as to the eligibility of newspapers to taking advantage of its provisions.

The first case involving this question arose in 1829. Clayton v. Stone, 2 Paine, 382, Fed. Cas. No. 3872. In this case it was held that a daily price-current or review of the market was not such a publication as falls under the protection of the copyright law. Referring to the copyright act, the court said: "The act in question was passed in execution of the power here given, and the object, therefore, was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent and durable character. The term science cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price current, the subject-matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way; it must seek patronage and protection from its utility to the public and not as a work of science. The title of the act of congress is for the encouragement of learning and was not intended for the encouragement of mere industry, unconnected with learning and the sciences. The preliminary steps required by law, to secure the copyright, cannot reasonably be applied to a work of so ephemeral a character as that of a newspaper." This language of the circuit court was quoted in full and approved by Justice Bradley in the case of Baker v. Selden, 101 U. S. 99, *loc. cit.* 105. The decision in this case, however, had nothing to do with newspapers, the point being as to the right to copyright a blank account book. See also the case of Iron Works v. Clow, 82 Fed. Rep. 316, where the language in the case of Clayton v. Powell, *supra*, is also quoted and approved.

The next authority on this question is the case of Harper v. Shoppell, 26 Fed. Rep. 519. The exact point here decided was that one who makes a plate from which a copy of a picture in an illustrated newspaper, that is copyrighted, can be produced, and sells the plate to another, is not guilty of violating the copyright. In this case defendant reproduced for publication in another paper a picture that was published in a certain issue of Harper's Weekly, a copyrighted illustrated newspaper published weekly. In this case the validity of the plaintiff's copyright was admitted without argument, the court saying: "The only question in the case is whether the unauthorized reproduction and sale of a copy of the cut by the defendant was an infringement upon the plaintiff's copyright. The copyright of the plaintiff's newspaper was a copyright of a book, within the meaning of the copyright laws." But the court held that the mere copyright of the newspaper as a "book" did not copyright the pictorial illustrations in it since the copyright act provides specially for the copyright of cuts, prints, etc.

The next and latest case containing a discussion of this perplexing question is that of Tribune Co. of Chicago v. Associated Press, 116 Fed. Rep. 126. In this case, the Chicago Tribune attempted to copyright, under contract, some special telegraphic matter of the London Times in its columns, by forwarding to the copyright office, copies of the issues containing such matter. The court held that this was not such a copyright of the special matter as to give the Tribune an exclusive right thereunder. The court said: "The alleged copyright is obtained by depositing in the post office at Chicago, on the evening before publication, the general title of the newspaper, 'Chicago Daily Tribune,' with serial number and date, and by like deposit, immediately after publication, of copies of the completed paper, each addressed to the librarian of congress, and followed by registration and certificate in due course. No special matter is thereby indicated as subject to copyright, but the newspaper is so entered as an entirety. It is at least questionable whether a copyright can thus be secured for a newspaper. In the early case of Clayton v. Stone, 2 Paine, 382, Mr. Justice Thomp-

son, presiding at the circuit, held that the constitutional provision for copyright 'cannot with any propriety be applied to a work of so fluctuating and fugitive form as that of a newspaper or price current, the subject-matter of which is daily changing and is of mere temporary use.' However the rule may be in reference to original matter published in such form, I am of the opinion that there can be no general copyright of a newspaper composed in large part of matter not entitled to protection."

In England the same controversy has existed as to whether newspapers were entitled to copyright. It is to be noticed that the English act provides for the copyrighting of "book" or "periodical." The early case of Cox v. Land & Water Journal Co., 39 L. J. Rep. (Ch. 1869) 152, held that a newspaper was not a book nor a periodical within the meaning of the copyright act. In the care of Walter v. Howe. 50 L. J. Rep. (Ch. 1881) 621, Jessel, M. R., refused to follow the case just cited, and held that a newspaper could be considered either a "periodical" or a "book" to bring it within the protection of the copyright laws. In the case of Cate v. Newspaper Co., 58 L. J. Rep. 288, North, J., directly approved the ruling of Jessel, M. R., and held that a copyright could be obtained in *ordinary* information published in a newspaper, where the requirements of the statute were complied with. The question, at last, came before the Court of Appeals and was finally settled in favor of a newspaper's right to copyright protection. The Trade Auxiliary Co. v. Protection Association, 58 L. J. Rep. (Ch. 1889) 293. The newspaper in this case existed for the purpose of publishing certain technical information, *i. e.*, a list of bills of sales and deeds of arrangement which were registered from time to time under provision of certain acts of Parliament. The court held this paper entitled to copyright. Lindley L. J., said: "Mr. Maidlow has argued this case with considerable ingenuity, but it is important to bear in mind the admission which he has made, and that is that Stubb's Gazette is in some sense an original publication; that is to say, that the author of it, or the composer of it, as he is called in section 18 of the copyright act, has bestowed some brain work upon it. It is not a mere collection of copies of public documents. If it had been, there might have been some question arising upon it; but there has been an abridgement, and mental work, and there has been that amount of labor which entitled the author of it, or the composer of it — for I take these two words to mean the same thing—to a copyright."

It would be difficult, even it if were not presumptuous, to attempt to lay down a definite rule where courts of such great learning and ability have so widely differed. It seems to the writer, however, that if a newspaper in form, at least, comes within the term "book" as used in the copyright act, and it is universally so held, that in subject-matter also, it very reasonably may be considered entitled to copyright protection. Why has not a newspaper proprietor who employs the best thought, appliances and resources to collect, write up and arrange the news of the day, the same right to protection as a historian who delves deep in dusty volumes of the past and collects, writes up, and arranges in original form the history of former ages? The incidents from which the historian makes up his history of former times appeared in the newspapers of those days, if they had newspapers.

It has been held that a newspaper is entitled to a copyright of its account of a public meeting and its stenographic report of the speeches made. Why not, therefore, to its original treatment and arrangement of any other news of the day? There is no question as to the monopoly of the news of the world, of which, of course, there could be no copyright, but a simple question as to the right of one, be he newspaper proprietor or not, to be protected in his efforts to write up in his own words, and and arrange in an original and attractive manner the news of the day. This is literary effort of the highest order. Indeed, the newspaper with its large staff of editors and contributors is the historian of the present. Its work is not ephemeral; it abides for all time, and from its old files will future historians find the material to write the story and proclaim the glories of our own generation. Let us grant the proprietors of our newspapers the protection that is justly due them in the interesting and important products of their busy brains and pens.

NOTES OF IMPORTANT DECISIONS.

STREET RAILROADS—LIABILITY FOR INJURIES TO FIREMEN ON THEIR WAY TO A FIRE.—Is a driver on a hose cart or fire engine justified in assuming that a street car would slacken its speed to permit him to cross the tracks. This question, together with others in close relation thereto, was decided in the recent case of Hanlon v. Electric Railway Co., 95 N. W. Rep. 100. After deciding that a firemen may rely on a custom of street cars slowing up when aware of the approach of fire apparatus, the court turns its attention to the question whether the necessity for speed reduces the liabilities of firemen to the danger of contributory negligence. The court said: "Only four decided cases with reference to street-crossing collisions with fire department vehicles have been brought to our notice. Of these Warren v. Mendenhall, 77 Minn. 145, 79 N. W. Rep. 661, and Decker v. Brookyln Heights R. (Sup.), 72 N. Y. Supp. 229, hold squarely that the circumstances surrounding the drivers are marked by material distinctions from those around other travelers, and that what would be negligence *per se* in the latter may well be open to a contrary conclusion in the case of the former. They fully support our view as above stated. On the other hand are urged upon us by the appellant Greenwood v. Railway, 124 Pa. 572, 17 Atl. Rep. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614, and Garrity v. Railway, 112 Mich. 369, 70 N. W. Rep. 1018, L. R. A. 529. In the former of these, the collision was with a steam railway train, where, of course, neither could the fireman's gong give any warning, nor was there any custom, nor, indeed, possibility, that the train should be slowed down or stopped after the wagon was in sight. The court held that the mere necessity for speed was not sufficient to absolve the driver from a duty to look for an approaching train, when, as there, he had full and practical opportunity to do so. In the Michigan case it was said to be against public policy, and therefore negligence *per se*, to drive through city streets at such speed as to make evasion of obstacles at crossings impossible; but the case was held to have been properly one for the jury, because it was within reasonable judgment and prudence to attempt to cross ahead of a car 100 to 150 feet away when the driver first sighted it—a holding that would support the view that plaintiff's negligence was properly a question in this case. In Magee v. West End Co., 151 Mass. 240, 23 N. E. Rep. 1102, the court holds that the duty of haste resting on a fireman constitutes a distinguished circumstance which might warrant a finding of due care in his case, though not in case of one not in such exigency. This was applied to plaintiff's manner of riding on a truck while adjusting his equipments. In Flynn v. Louisville Co. (Ky.), 62 S. W. Rep. 490, the court expresses views generally in recognition of the sufficiency of the necessity for speed and existence of right of way over cars to exculpate a driver of a salvage wagon attempting the crossing, but the case turned upon the supervening negligence of the motorman, and the question of contributory negligence in plaintiff was not authoritatively decided. The result of these decided cases from other courts is to confirm the view alaeady expressed that the question whether, under all the circumstances, plaintiff was guilty of contributory negligence in attempting to cross Vilet street ahead of the car, was properly for the jury."

As to whether a fireman is always compelled to "look and listen" the court said: "Another request for instruction was to the effect that one approaching a car track 'must, in the exercise of ordinary care, look and listen for an approaching car, and continue so to look and listen up to the last moment that such acts would be of any virtue in preventing a collision with a car.' Conceding that this is a correct abstract rule, as in most of its language it is, yet it has no application to the present case, for the evidence establishes without controversy that the plaintiff did look and see and know all that could have been ascertained by the utmost vigilence. The instruction is, however, faulty, and faulty in a respect relevant to the situation here. It lacks the qualification that one must look and listen if he have an opportunity so to do. There is possibility, especially with one managing a team and vehicle, that his continued observation of the track in either direction may be at least morally impossible; that his attention may not be diverted, as has been incorrectly said in one or two cases, but absolutely forced away from watchfulness. For example, in this case it is just as essential to plaintiff's due care that he should look westward for an approaching car as that he should look eastward, and the only intimation in the evidence of any diversion of his attention from the car which struck him was for the purpose of the exercise of this duty. If this instruction required him, from the moment he was in position to see up or down Vilet street, to keep his eyes fastened on this particular car, and to govern his conduct without informing himself as to the condition of things in the other direction, it of course contains its own refutation, for that would necessarily be negligence. The possibility of the forcing away of one's attention as an excuse for continued watchfulness is discussed in Guhl v. Whitcomb, 109 Wis. 69, 74, 85 N. W. Rep. 142, 83 Am. St. Rep. 889, where the previous cases were collected, and where it was pointed out that no ordiuary or trifling circumstance could justify diversion or withdrawal of attention; yet, where the circumstances so forced it away, it might be well held that a plaintiff had not the opportunity to look or listen."

POWER OF THE STATE TO OPERATE COAL MINES AND CONSCRIPT MEN FOR THAT PURPOSE WHEN NECESSARY TO AVERT A PUBLIC CALAMITY.

The recent wide-spread suspension of coal mining operations in this country, a suspension which lasted for months extending over vast areas of territory, depriving large multitudes of people, especially of the poorer classes, of the health-giving and life-sustaining benefits derivable from a sufficient supply of fuel for heating and cooking purposes, as well as the extortions practiced by coal dealers on those who were able to purchase to a greater or lesser extent a supply of fuel, gave rise in my mind to a line of thought, which had for its interrogation point, the query: Is there a remedy for such a condition of things, and if so, where does it lie and in what consist?

Naturally, we should look for the remedy in the exercise of the police power of the states in which such disturbances arise. Touching the exercise of this power, Judge Cooley says: "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offense against the state, but also to establish for the intercourse of citizens, with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others." And in the same connection, he says further that such power, "like that of taxation pervades every department of business, and reaches to every interest and every subject of profit or enjoyment."[1] Elsewhere the learned author, after speaking of the difficulty of enumerating all of the instances in which the power is mentioned, is or may be exercised, proceeds to give the following comprehensive summary of instances where such power may find its appropriate exercise: "And there are other cases where it becomes necessary for the public authorities to interfere with the control by individuals of their property, and even to destroy it, where the owners themselves have fully observed all their duties to their fellows and to the state, but where, nevertheless, some controlling public necessity demands the interference or destruction. A strong instance of this description is where it becomes necessary to take, use, or destroy the private property of individuals to prevent the spreading of fire, the ravages of a pestilence, advance of a hostile army, or any other great public calamity. Here the individual is in no degree in fault, but his interest must yield to that "necessity" which "knows no law."[2] Perhaps the earliest instances where this power was exercised was in the Saltpetre

[1] Cooley's Const. Lim. 704.

[2] Cooley's Const. Lim. 739. "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth is * * * held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the rights of eminent domain, the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power; the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, nor repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise." Com. v. Alger, 7 Cush. 53 Another eminent judge, treating of the same topic, says: "This police power of the state 'extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alieunum non laedas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may use his own as not to injure others.' And again: (By this) 'general police power of the state, persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right in the legislature to do which, no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.'" Redfield, C. J., in Thorpe v. Rutland R. R. Co., 27 Vt. 140.

case,[3] where it was ruled that the king could dig in the land of a subject for that mineral in order to the manufacture of gun-powder, for this was necessary to the defense and safety of the realm.

Necessity seems to be the basis on which the exercise of this power is made to rest. Thus in Mitchell v. Harmon,[4] it was ruled that private property might be taken in time of war by a military commander, in order to prevent it from falling into the hands of the enemy, but the danger of this must be iminent and impending, or the necessity urgent for the public service, such as will not admit of delay. And, it was also ruled in that case, that the officer in command could not, without incurring personal liability, take possession of private property for the purpose of insuring the success of a distant expedition on which he is about to march. Similar observations fell from Judge Christiancy in People v. Jackson,[5] where he said: "Powers, which can only be justified on this specific ground (that they are police regulations), and which would otherwise be clearly prohibited by the constitution, can be such only as are clearly necessary to the safety, comfort and well being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it."

In Jones v. City of Richmond,[6] at the time of the surrender of the confederacy, when an army flushed with victory was about to enter the city, the municipal authorities fearing the consequences of the entrance of large bodies of men into what had heretofore been an inaccessible as well as a hostile city, resolved to destroy the entire stock of liquor, etc., then in the city, and they gave receipts for the values destroyed, and afterwards, the city was sued *in assumpsit* for such values. The facts clearly presented a case of a compulsory seizure and destruction of the liquors, and, in order to show that the municipal authorities had pursued in the matter all proper precautionary steps before seizing the liquors, the court of appeals remarked: "The resolutions of the city council for the destruction of these liquors were taken on the eve of its evacuation in April, 1865, and were carried into effect just before the entry of the federal forces. However, opinions may differ as to the extremity of this emergency, and the propriety of the measures thus taken, to remove the most common, if not the most certain cause of riot and military insubordination upon such an event, it must be conceded that this step was not inconsistent with a prudent forecast, a wise discretion and a reasonable precaution. It may not now be possible to determine how far military discipline might have restrained the soldiery and the populace under the ordinary license and excitements incident to such an occasion, from the plunder of these liquors, and the disorders usually created by it; the natural probability, however, that it might not have been prevented by all the resources of military discipline, should now be accepted as a sufficient justification of that discretion, which was reasonably employed in removing such a prolific source of disorder and brutal license on an occasion so threatening to the safety of property and the good order of society. It was not for the council, in its deliberations on the 2d of April, to foresee the order of events of a military, hostile occupation, or determine whether or not, by design or accident, the city might be exposed to the perils of rapine and disorder under such circumstances. Hence, it must be admitted that these legislative guardians of the city were well justified in the exercise of a discretion as to the destruction of stores so dangerous to the peace and safety of the city; and that there is nothing in the facts of this cause to create the belief that their action in the premises was not the result of a sound discretion and proper precaution." The case, however, mainly turned on the power of the city council to adopt the resolutions mentioned; and holding such power to exist, the city was held not liable for the destruction of the liquors. That case seems to be clearly an authority for the position that property may be destroyed by the constituted authorities, where its existence, through the exigency of the situation, becomes a menace and a danger to

[3] 12 Coke, 13.
[4] 13 How. 115.
[5] 9 Mich. 285.
[6] 18 Gratt. 517.

the safety of persons and property in the immediate locality, where the action complained of is taken, and that case also seems to be an authority for the theory that the legislature of the state may empower a municipal corporation to exercise the police power in destroying property which might result in the gravest detrimental results both to persons and property, should it remain undestroyed.

Bearing, to a considerable extent, on the point in hand, is an opinion delivered by the judges of the Supreme Judicial Court of Massachusets in response to questions propounded to them by the house of representatives of that state. In answering these interrogatories, the judges responded that the legislature had the power, under the constitution, to authorize the cities and towns within the commonwealth to manufacture and distribute gas or electric light for use in their public streets and buildings, and for sale to their inhabitants, and that such manufacture, etc., might properly be regarded as constituting a public service.[7] Later on, to-wit, May 7, 1892, in response to questions on seemingly a cognate subject, five of the judges responded that the legislature, under the constitution, had not the power to authorize the cities and towns of the commonwealth to buy coal and wood for the purpose of sale to their inhabitants for fuel. But this response was given when the coal market was in its normal condition with no agitation in values or heightening in prices in consequence of impending strikes and the closing down of numerous coal mines, thereby threatening a coal famine. And with regard to such an abnormal condition of things as that just indicated, those judges very carefully said: "We are not aware of any necessity why cities and towns should undertake this form of business any more than many others which have always been conducted by private enterprise, and we are not called upon to consider what extraordinary powers the commonwealth may exercise or may authorize cities and towns to exercise in extraordinary exigencies for the safety of the state or the welfare of the inhabitants." Judge Holmes was of the opinion that the legislature had the power to enact such a law, as much so with regard to fuel as to with regard to water or gas or electricity or education. Judge Barker replied, yes, "if the necessities of society, as now organized, can be met only by the adoption of such measures, and no, if there is no such necessity, but merely an expediency for the trial of an experiment."[8]

In the subsequent case of "*In re* Municipal Fuel Plants,"[9] where similar questions were asked as in the next preceding case, the judges with one exception replied: "In regard to the fourth of the possible consequences, a condition in which the supply of fuel would be so small, and the difficulty of obtaining so great, that persons desiring to purchase it would be unable to supply themselves through private enterprise, it is conceivable that agencies of the government might be able to obtain fuel when citizens generally could not. Under such circumstances, we are of the opinion that the government might constitute itself an agent for the relief of the community and that money expended for the purpose would be expended for the public use." Judge Loring dissented, but both the majority and the dissenting opinions proceed on the theory that coal in cities should be deemed and regarded as a "*necessity of existence.*" And the correctness of this position all will concede.

It will have been observed that the state in the exercise of the power in question, can, at its option, either *destroy* or *use* the property of the citizen where this is done for a public use under the spur of an immediate and imperious necessity that admits of no delay. *Use* and *destruction* then, so far as concerns the exercise of the power of the state are convertible terms; either or both may be employed in affording the relief demanded; a relief sufficient to meet and fulfill the pressing exigency of the instant case; and this being done, let the relief cease with the necessity which gives it origin.

And it will also have been observed that the power in this regard applies as well to *persons* as to *property*. Under the authorities cited, the coal in the mine could be destroyed to stop the spread of a conflagration, to check the advance of a hostile army, or to arrest the ravages of a pestilence; and if so, why could it not also be used to avert such a great public calamity as a *coal famine?* Surely such an instance as that, an instance which concerns a *necessity of life*, might as forcibly invoke the police power of the state as the advance

[7] 150 Mass. 592.

[8] 155 Mass. 588.

[9] 66 N. E. Rep. 25, decided January 28, 1903.

of hostile legions, the spread of a conflagration, or the ravages of "the pestilence that walketh in darkness."

But the query may be asked how shall the coal mines of recalcitrant mine owners be worked? The reply is, the same power which drafts or conscripts men into the service of the state in time of war may also in time of peace pursue a like course in order to obtain workers for the mines. The right being conceded on the part of the state, to work the mines, carries with it as a necessary coincident, the right to compel citizens to work the mines, without which right the principal right would be wholly unavailing and ineffectual. It is highly probable that some legislation would be necessary in order to carry into effect the police power of the state as above indicated. If so, it would be of a very simple and plain character; and it might embrace within its scope details for the payment of the laborers in the mine, and for compensation to the mine owner for the value of the coal taken—something which the owner could not demand as a right unless the proceeding against his mine had been conducted under the power of the eminent domain. Such legislation could go into detail regarding the sale of the coal at reasonable and uniform rates to all who should have need to buy; and could provide that paupers could have their coal free; and this is the course it seems is pursued on this last point in Massachusetts.

If precedent positions are correct, then the railroad corporations of the state would fall subject to the power under review, and could be compelled to transport the coal thus mined to its proper destination; and in the event of failure, the state could take possession of the necessary number of freight cars and engines, and itself conduct the needed transportation; and legislation could be enacted sufficiently comprehensive also, to embrace this point, and to establish rates for, and regulations of such service, etc.

Under the assertion and exertion of such a power by the state, the arrogant extortions of vast aggregations of capital, as well as the unreasonable demands of leagued labor, would indubitably be repressed. And it has seemed to me, while thinging on this subject, that if the state cannot pursue some such course, as that heretofore outlined, then it has no inherent power to prevent its own destruction, whenever an emergency which threatens that result shall arise.

I have given expression to these views in a tentative way in the hope that the subject being now broached, may receive a more full and adequate discussion and investigation, such as its great importance evidently demands. It will have been noted that the point which has been discussed is one of first impression, never having been adjudicated; and in its investigation and discussion, I have had to rely upon analogous cases and upon reasons to be drawn from principles and precedents already established, and, therefore, have felt something of hesitancy in entering upon this new and untried field of discussion. If, however, my deductions from the stated premises be correct; if the state possesses the power to afford the much-needed relief, as above indicated; in short, if the *power of self-preseration inheres in the very fact of its organization* as a state, then, indeed, will

"Sovereign Law, the state's collected will
O'er thrones and globes elate,
Sit empress, crowning good, repressing ill."

T. A. Sherwood.

St. Louis, Mo.

CUSTOM AND USAGE—EVIDENCE OF KNOWLEDGE.

BIXBY v. BRUCE.

Supreme Court of Nebraska, May 20, 1903.

One not shown to have knowledge of a trade usage confined to a peculiar business, which is not shown to be of such a general and notorious character that he must have been presumed to have contracted with reference to it, is not bound by such usage.

Syllabus by the court.

Hastings, C.: This was an action to recover from the plaintiff in error, Bixby, an alleged balance of $267.08 for material and labor furnished in the construction of a brick building at Hardy, Nebraska. The parties will be designated "plaintiff" and "defendant," as they were at the beginning of the litigation. Plaintiff's account, as stated in his petition, amounted to $1,758.47. On this he admitted having received $1,517.37, and he brought suit for the balance, with interest. The defendant answered, admitting four items of plaintiff's account; admitted the furnishing of brick for the building, but says that instead of 167,237 brick only 138,491 were furnished. Some other items were disputed, and defects in the building were alleged, causing damage in the sum of $500, and judgment was asked against the plaintiff in the sum of $527. There

was a general as well as special denials in the answer, which was itself denied. On trial to a jury the plaintiff recovered a verdict for $88.20. Motion for new trial was overruled, and from judgment on this verdict the defendant brings error.

The sole error complained of is the giving of the following instruction: "You are further instructed that if you shall find from the evidence that the plaintiff erected for the defendant, under a verbal agreement, a brick building the walls of which were to be and were 14-inch hollow walls, and that no agreement was made between the plaintiff and the defendant as to the rule of measurement of the brickwork in such building, under the evidence in this case the plaintiff would be entitled to measure and receive pay for such building as a 14-inch solid wall. And if, after the completion of the building, a settlement was had, and through inadvertence or mistake the building was improperly figured to the injury of the plaintiff, such fact would not preclude his recovery in this action." The plaintiff simply alleges that he "furnished 167,237 brick laid in the wall" at $8 per M. The defendant says that it was agreed that the wall should be 14 inches in thickness, and with a 2-inch air space, and that the plaintiff agreed that it should be figured as a 12-inch, and not as a 14-inch wall; that the plaintiff's computation is for a 14-inch solid wall, and that one-seventh must be deducted because of the 2-inch air space. Plaintiff, at the trial, introduced, without objection from defendant, some evidence to prove a custom among masons to charge for the empty space in hollow walls in computing the number of the bricks laid. He says that it was computed so in this instance. As above indicated, the sole error complained of is the telling of the jury by the trial court that under the evidence plaintiff would be entitled to measure and receive pay for a 14-inch solid wall if no agreement as to the manner of ascertaining the number of brick was found. The evidence hardly seems to warrant so emphatic an instruction. It is certainly not a matter of judicial knowledge that masons, in ascertaining the number of brick in a wall, always count the air space as if it were filled solidly with brick. The evidence in this case entirely fails to establish any such immemorial general custom. It shows, at most, only what is designated by Mr. Greenleaf "a usage of trade," as to which he says: "It is sufficient if it be established, known, certain, uniform, reasonable, and not contrary to law. These usages, many judges are of the opinion, should be sparingly adopted by the courts as rules of law, as they are often founded in mere mistake, or on the want of enlarged and comprehensive views of the full bearing of principles. Their true office is to ascertain the nature and extent of contracts, arising not from express stipulation, but from mere implications and presumptions, and acts of doubtful and equivocal character, and to fix and explain the meaning of words and expressions of doubtful and various senses. On this principle the usage and habit of trade or conduct of an individual which is known to the person who deals with him may be given in evidence to prove what was the contract between them." 2 Greenleaf's Evidence, § 251. In the present case the real question between the plaintiff and defendant is, what was intended by the phrase, "$8.00 per thousand for brick in the wall?" It is not claimed on behalf of the defendant in error that any evidence tended to show knowledge of this usage on the part of the defendant, or that the contract was made with such usage in view. Such a custom among masons is testified to by the plaintiff and by two other witnesses. While there are some cases holding that no such usage can be shown in connection with an express contract for brick at a certain price. Sweeney v. Thominson, 9 Lea (Tenn.), 359, 42 Am. Rep. 676, the better doctrine seems to be that such a custom or trade usage may be shown as a means of ascertaining the intention of the parties to a contract, but never to thwart or control such intention. Kendall v. Russell, 5 Dana (Ky.), 501, 30 Am. Dec. 696.

It is urged that defendant is not in a position to complain of this construction, because he did not, at the trial below, in fact raise the issue as to the existence of this usage, or his own knowledge of it, but attempted to establish an agreement that it should be disregarded, and a different rule of measurement adopted. It should be remembered that, as before stated, the plaintiff's petition it simply for the price of 167,000 brick. No allegation of any custom or measuement is made. Defendant is alleging that only 138,000, and no more, were laid. There is also a general denial attached to the answer. It hardly seems that plaintiff ought to derive any advantage by reason of the fact that he has failed to allege such a usage in his petition. In First National Bank v. Farmers' & Merchants' Bank, 56 Neb. 149, 76 N. W. Rep. 430, it is held that a usage of a particular trade, to be available, must be pleaded, and, if denied, must be proven. It seems clear that the court, in undertaking to say that, in the absence of a special agreement as to the manner of measurement, the wall and the air spaces should be counted as a solid one, is not warranted by the evidence. It was a question of the intention of the parties, an attempt to vary and control the ordinary meaning of the contract terms by means of a trade usage. In order to have the proposed effect, either knowledge of such usage on the part of the defendant or such a general knowledge of it as to lead to a conclusive presumption that he knew of and contracted in reference to it, must have been shown. Century Digest, vol. 15, col. 1244; Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225. Neither of these appears in this case. It does not affirmatively appear that defendant was aware of such usage, nor does it appear to have been so general and so well known that he must be presumed to have con-

tracted with reference to it, and the utmost which plaintiff would have been entitled to have under the evidence shown here would be a submission of this question to the jury, and the taking of the jury's finding as to whether or not the contract was made with reference to such usage.

We conclude that the court was in error in deciding itself, and so telling the jury, that, in the absence of a special contract, this wall must be measured as if it were a 14-inch solid one; that whether or not such a rule of measurement was the one really agreed upon, and to be applied in this case, was a question for the jury under all the facts. For this error it is recommended that the judgment of the trial court be reversed, and the case remanded for further proceedings.

AMES and OLDHAM, CC., concur.

Per Curiam. For the reasons stated in the foregoing opinion, the judgment of the trial court is reversed, and the case remanded for further proceedings.

NOTE.—*What Constitutes Actual Knowledge or a Sufficient Presumption of Knowledge of a Trade Custom to Bind a Party to a Contract.*—It is so well substantiated in our law as hardly to require the citation of authority that where a usage is special, and confined to a particular business, or to a particular place, it is not admissible to limit the meaning of a written contract, except on proof that both parties had knowledge of it. Isaksson v. Williams, 26 Fed. Rep. 642; Chateaugay Co. v. Blake, 144 U. S. 476; Rickerson v. Insurance Co., 149 N. Y. 307, 43 N. E. Rep. 856; Marlatt v. Clary, 20 Ark. 251; Fitzgerald v. Hanson, 16 Mont. 474, 41 Pac. Rep. 230; Kelly v. Milling Co., 92 Ga. 105, 18 S. E. Rep. 363; Flatt v. Osborne, 33 Minn. 98, 22 N. W. Rep. 440; Underwood v. Legion of Honor, 66 Iowa, 134; Howard v. Insurance Co., 109 Mass. 384; Simon v. Johnson, 101 Ala. 368, 13 So. Rep. 491. Thus the laws, rules and regulations which govern the members of the New York Cotton Exchange can have no effect upon the legal rights of a party to a contract, who did not know or acquiesce in the same. Blakemore v. Heyman, 6 Fed. Rep. 588. It has been held that knowledge of a local custom by a shipping agent is not knowledge of his principal. Berry v. Cooper, 28 Ga. 543. In Alabama, however, it was held that usage which the agents of a railroad company have allowed to grow up in the business, is binding on such company, though contrary to its established regulations, and unknown to its managing officers. Montgomery, etc., R. R. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54. In a later case in this state, this doctrine seems to have been overruled. Simon v. Johnson, 101 Ala. 368. Here it was held that a custom in the town in which goods were sold to pay a traveling salesman is not binding on non-resident principals, in the absence of evidence of notice to them of such custom. So also in New York, where it is held that usage adopted by a certain class of factors, will not relieve such a factor from a liability which the law would otherwise impose upon him, unless he shows that his principal had knowledge of such usage. Farmers,' etc., Bank v. Sprague, 52 N. Y. 605. Many other authorities might be cited to illustrate the truth of the principle that one who has no knowledge of a local custom, confined to a particular business, cannot be bound thereby. The rule rests on reasons too well known to require any argument in their favor, and no exceptions to the principle here especially referred to have ever come to our attention.

Presumption of Knowledge.—When and under what conditions will knowledge of a certain special trade usage be presumed? The rule might be succinctly stated as follows: If a usage is special and confined to a particular business, or has reference to a particular place only, there is no presumption that the parties knew it. But where a custom is universal, notorious and long-continued, knowledge thereof may be presumed. In other words, a party to a contract is not bound by a usage of business in reference thereto, unless it is known to him, or is so general and well-established as to raise a presumption that he knew it. Isaksson v. Williams, 26 Fed. Rep. 642; Fitzgerald v. Hanson, 16 Mont. 474, 41 Pac. Rep. 230; Howard v. Insurance Co., 109 Mass. 384; Barker v. Borzone, 48 Md. 474.

The following authorities are instances in which knowledge was presumed because the custom in each case was held to be universal, notorious and long-continued. McMasters v. Railroad Co., 69 Pa. St. 374, 8 Am. Rep. 264; Union Stock Yards Co. v. Westcott, 47 Neb. 300, 66 N. W. Rep. 419; Wadley v. Davis, 63 Barb. (N. Y.) 500; British, etc, Co. v. Tibbals, 63 Iowa, 468. Thus, evidence that clerks of steamboat owners were accustomed for a period of 30 years to sign notes for expenses on request by captain was sufficient to create a presumption of knowledge on the part of owners. Mott v. Hall, 41 Ga. 117. So where an insured had been contracting insurance with one firm, knowledge of the customs of such firm in effecting such insurance will be presumed. Home Insurance Co. v. Favoute, 46 Ill. 263. It is to be carefully borne in mind in all these cases that a person is not bound under this statement of the rule by custom, unless it be so notorious, universal and well-established that his knowledge thereof will be conclusively presumed. Walsh v. Mississippi, 52 Mo. 434.

We shall now turn our attention to cases which hold that the customs sought to be enforced were not to be presumed. Thus in an action for the hire of teams furnished a traveling salesman in a particular town, a custom in that town to provide the expenses of salesmen will not relieve the principal. Bentley v. Daggett, 51 Wis. 224, 37 Am. Rep. 827. The custom of a particular financial institution is not binding on persons dealing with it, unless they had knowledge of the usage, or had previous dealings with the institution, from which such knowledge could be presumed. Dabney v. Campbell, 28 Tenn. 680. When a steamboat company employed men to clear a river of snags, they were not bound by a custom to give such employees their board in addition to their wages, where it never before was engaged in such business and could therefore know nothing about it. Pennell v. Transportation Co., 94 Mich. 247, 53 N. W. Rep. 1049. So, also, a banker will not be presumed to know the custom of architects in charging a certain percentage on the cost of a building. Packer v. Penticost, 50 Ill. App. 228. So, also, Steward v. Scudder, 24 N. J. L. 96; Walsh v. Transportation Co., 52 Mo. 434; Taylor v. Mueller, 30 Minn. 343, 15 N. W. Rep. 413.

Another phase of the subject before us is that regarding persons in particular trade. The rule is that persons engaged in a particular trade or business are bound to inform themselves as to the customs and usages of such business, and hence knowledge on the part of such persons will be presumed. Daniels v.

Insurance Co., 66 Mass. 416, 59 Am. Dec. 192; Hazards Admr. v. Insurance Co., 8 Pet. (U. S.) 557; Carter v. Coal Co., 77 Pa. St. 286; Hartshorn v. Insurance Co., 36 N. Y. 172; Deshler v. Beers, 32 Ill. 368, 83 Am. Dec. 274. Thus, notice to insurers of a uniform usage to carry particular goods on deck is not necessary to the implication that they insured a vessel with reference thereto, since they are bound to know the general usages of the particular trade in which the vessels insured by them are engaged. Toledo, etc., Co. v. Spears, 16 Ind. 52. So, also, in an action for damages for breach of contract to furnish a certain number of reams of paper, the fact that plaintiff had been in the paper business for a number of years preceding the execution of the contract in question establishes, presumptively, at least, his knowledge of any well-known and prevalent custom in that trade. De Cernea v. Cornell, 22 N. Y. Supp. 941.

Conclusiveness of Presumption. — What degree of conclusiveness attaches to the presumption of knowledge of which we have been speaking in the preceding paragraphs? The leading case, and the best reasoned case also, is that of Walls v. Bailey, 49 N. Y. 464, a case very similar to the principal case. In this case, plaintiffs contracted, in writing, to furnish the materials to do certain plastering for defendant upon his building in Buffalo, at so much per square yard. They included in their bills and charged for the full surface of the walls, without deduction for cornices, base boards, or openings for doors and windows. To support these charges they proved under objection that it was the uniform, well-settled custom of plasterers in Buffalo so to measure and charge. To meet this presumption, defendant, as a witness in his own behalf, was asked if at the time of contracting he had any knowledge of the custom claimed. The trial court excluded this evidence on the ground that the presumption being uniform and established was not subject to rebuttal. The court of appeals, in a well-reasoned opinion, reverses the trial court's ruling and lays down what it regards as the correct rule, as follows: "Parties are presumed to contract in reference to a uniform, continuous and well-settled usage pertaining to the matters as to which they enter into agreement, where such usage is not in opposition to well-settled principles of law and is not unreasonable. But where the usage is of a particular trade or locality, such presumption is not conclusive and may be rebutted by proof of such usage." There are some cases in which will be found expressions stating the law to be that under certain circumstances such presumptions become presumptions of law, and not of fact. But in speaking of these cases, the court said: "There are many cases in which the language used would seem to indicate that the existence of a usage of a trade, profession, or locality having been shown, the presumption indisputably arises that the parties contracted in reference to it. * * * It would seem, however, that upon principle, for a party to be bound by a local usage, or a usage of a particular trade or profession, he must be shown to have knowledge or notice of its existence. For upon what basis is it that a contract is held to be entered into with reference to, or in conformity with an existing usage? Usage is engrafted upon a contract or invoked to give it meaning, on the assumption that the parties contracted in reference to it; that is to say, that it was their intention that it should be a part of their contract, wherever their contract in that regard was silent or obscure. Of course, then, a usage is to be established or negotiated in all its essentials, as well as to knowledge as to any other, by the same character and weight of evidence as are necessary to maintain other allegations of fact. It may be established by presumptive, as well as direct evidence. Nor, on the other hand, is it exempt from the difficulty, that a presumption may not prevail against direct evidence to the contrary of it." To same effect see Isaksson v. Williams. 26 Fed. Rep. 642.

JETSAM AND FLOTSAM.

IS THE "INITIATIVE AND REFERENDUM AMENDMENT" IN CONFLICT WITH THE CONSTITUTION OF THE UNITED STATES.

THE CENTRAL LAW JOURNAL of March 27, 1903, contains an article written by Hon. Thos. A. Sherwood, who was a member of the Supreme Court of the state of Missouri for more than thirty years. In this article the learned judge contends that the proposed amendment to the constitution of Missouri and the one adopted by South Dakota and Oregon, known as the "initiative and referendum amendment," is in conflict with section 4, article 4 of the Constitution of the United States, which reads as follows:

"The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and upon application of the legislature or executive (when the legislature cannot be convened), against domestic violence."

The learned judge contends that our government is a representative one; that the representatives of the people are the only law-making power in harmony with our constitution, and that if the power to control their representatives is placed in the hands of the people it would be unconstitutional. We quote the following from his article which we think clearly defines his position, viz.: "I am unable to reach any other conclusion, but that the amendment cannot withstand the test and charge that it attempts to substitute for a 'republican form of government,' something which does not come up to the standard of such a form of government as understood at the time of the adoption of the federal constitution, a contemporary construction, which has never been departed from, but which has received the express sanction of the Supreme Court of the United States, as 'unmistakable evidence of what was a goverment republican in form within the meaning of that term as employed in the constitution.' Nor do I believe that the conclusion just announced is at all affected or in any manner impaired by reason of the fact that the proposed amendment allows the general assembly to retain certain shreds and patches of legislative power, to pass certain perfunctory laws relating to appropriations, etc. A legislative body so shorn of its customary and constitutional functions cannot be longer regarded as the representative of the people. The legislative power cannot be halved, quartered, nor in any other way subdivided. A representative democracy cannot be crossed with an 'absolute' democracy, and still the hybrid resultant from such copulative conjunction prove to be, and constitute, 'a government republican in form.' Clay and iron can not in such cases be welded together any more than they could in the feet of the image which Daniel saw in his vision."

We believe that the learned judge's construction of this clause of the constitution is not in harmony with its spirit, nor with the views entertained by its framers.

We find that Mr. Edmund Randolph, a delegate from Virginia, is the author of this clause of the constitution. That he laid before the convention a plan for a constitution, and of which paragraph eleven read:

"Resolved, That a republican government, and the territory of each state (except in the instance of a voluntary junction of government and territory,) ought to be guaranteed by the United States to each state." June 19th it was amended so as to read as follows:

"Resolved, That a republican constitution, and its existing laws, ought to be guaranteed to each state by the United States." It was again amended on July 26th to read as follows:

"Resolved, That a republican form of government shall be guaranteed to each state; and that each state shall be protected against foreign and domestic violence." It was again amended on August 6th, so as to read as follows:

"The United States shall guarantee to each state a republican form of government; and shall protect each state against foreign invasions; and on the application of its legislature, against domestic violence." Again, on August 30th, it was amended to read: "The United States shall guarantee to each state a republican form of government; and shall protect each state against invasions; and on the application of its legislature or executive, against domestic violence." Again, it was amended on September 12th so as to read as follows: "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each against invasion, and, on application of the legislature or executive, against domestic violence." And on September 15th it was amended to the form that it now appears in the constitution.

We agree with the learned judge that this clause should receive a construction contemporaneous with its enactment. What did the framers of this clause intend to guard against? Did they fear that the people might some time find a practicable way of enacting their own laws, or did they fear that certain parties might some time get in control and erect an aristocratic or monarchical form of government? If they feared the latter and not the former, then where the reason of rule ceases, "the law itself ought likewise to cease with it."

The Attorney-General of Maryland, Luther Martins, who was a delegate from that state, made to the legislative assembly of that state, on January 27, 1788, a report of the proceedings of the framers of the constitution. We copy from said report the following:

"It was found there were among us three parties of very different sentiments and views: One party, whose object and wish it was to abolish and annihilate all state governments, and to bring forward one general government over this extensive continent, of a monarchical nature, under certain restrictions and limitations. Those who avowed this sentiment were, it is true, but few; yet it is equally true, sir, that there was a considerable number who did not openly avow it, who were, by myself and many others of the convention, considered as being in reality favorers of that sentiment, and, acting upon those principles, covertly endeavoring to carry into effect what they well knew openly and avowedly could not be accomplished. The second party was not for the abolition of the state governments, nor for the introduction of a monarchical government under any form; but they wished to establish such a system as could give their own states undue power and influence, in government, over other states. A third party was what I considered truly federal and republican. This party was nearly equal in number with the other two." * * * "This party, sir, was for proceeding upon terms of federal equality; they were for taking our present federal system as the basis of their proceedings, and, as far as experience had shown us that there were defects to remedy those defects; as far as experience had shown that other powers were necessary to the federal government, to give those powers." * * * "But, sir, the favors of monarchy, and those who wished the total abolition of state governments, well knowing that a government founded on truly federal principles, the basis of which were the thirteen state governments preserved in full force and energy, would be destructive of their views; and knowing they were too weak in numbers to openly bring forward their system, conscious, also, that the people of America would reject it if proposed to them, joined their interest with that party who wished a system giving particular states the power and influence over the others, procuring, in return, mutual sacrifices from them, in giving the government great and undefined powers as to its legislative and executive; well knowing that, by departing from a federal system, they paved the way for their favorite object, the destruction of the state governments, and the introduction of monarchy."

Mr. Randolph, the author of this clause, never, to our knowledge, discussed this clause or gave his reasons for its enactment. But Mr. Madison, who was also a delegate from Virginia, and who probably acted in conjunction with his associate in framing it, did publish in the *Federalist* of January 25, 1788, a construction of this clause. This construction was given by him about three months after the adjournment of the convention, and it has never been questioned. Judge Story regarded the construction given by Mr. Madison of such unquestionable authority that he copied it into and made it part of his great work, Story on the Constitution. The construction of Mr. Madison of this section is as follows:

"6. 'To guaranty to every state in the Union a republican form of government; to protect each of them against invasion; and, on application of the legislature or the executive, when the legislature can not be convened, against domestic violence.' In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate monarchical the nature of such an union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into, should be substantially maintained.

"But a right implies a remedy; and where else could the remedy be deposited, than where it is deposited by the constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature. 'As the confederate republic of Germany,' says Montesquieu, 'consists of free cities, and petty states, subject to different princes, experience shows us, that it is more imperfect than that of Holland and Switzerland.' 'Greece was undone,' he adds, 'as soon as the king of Macedon obtained a seat among the Aphyctiones.' In the latter case, no doubt,

the disproportionate force, as well as the monarchical form of the new confederate, had its share of influence on the events.

"It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the state governments, without the concurrence of the states themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provisions in such an event will be a harmless superfluity only in the constitution. But who can say, what experiments may be produced by the caprice of particular states, by the ambition of enterprising leaders, or the intrigues and influence of foreign powers? To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no further than to a guaranty of a republican form of government which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the states, they are guaranteed by the federal constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican constitutions; a restriction which, it is presumed, will be hardly considered as a grievance."

Judge Sherwood, in his article, has frequently cited and quoted Judge Cooley, as though he was in harmony with his views. But the following which we quote from Cooley's Constitutional Limitations, star, page 17, we think shows that Judge Cooley entertained a contrary view to that of Judge Sherwood upon this clause of the constitution.

Judge Cooley said: "The last provisions that we shall here notice are that the United States shall guarantee to every state a republican form of government, and that no state shall grant any title of nobility. The purpose of these is to protect a union founded on republican principles, and composed entirely of republican members against aristocratic and monarchical innovations."

Daniel Webster, one of America's greatest statesmen, discussing the principles of our government, said: "Now, without going into historical details at length, let me state what I understand the American principles to be, on which this system rests. First and chief, no man makes a question, that the people are the source of all political power. Government is instituted for their good, and its members are their agents and servants." * * * "There is no other doctrine of government here." * * * "Since the Declaration of Independence, any person who looks to any other source of power in this country than the people, so as to give peculiar merit to those who clamor loudest in its assertion, must be out of his mind, even more than Don Quixote." * * * "Well, then, having agreed that all power is originally from the people, and that they can confer as much of it as they please, the next principle is, that, as the exercise of legislative power and other powers of government immediately by the people themselves is impracticable they must be exercised by representatives of the people."

We understand that it was the practice with the people of the early colonies, where their charters permitted them to enact laws, to meet in general assembly and vote directly upon the passage of laws. That when the people became more numerous and were distributed over a larger territory, it became impracticable for them all to meet in one general asembly for the purpose of enacting laws, and that this was the sole reason for adopting the representative system. We do not believe that a single instance can be found in the history of our forefathers where the direct voice of the people in the enactment of laws proved prejudicial to good government. We do not believe that the framers of the constitution considered that it was dangerous to permit the people to vote on their laws, or that they intended to prohibit the people from voting directly upon the enactment of laws if a practicable means could be devised for obtaining such a vote. We do not believe that they considered that representatives were better qualified to know what the people required, or that they would enact laws more in the interest of the people, or that they were more stable or less corruptable. Legislatures had their records of dishonesty, bribery and betrayal of public trust, which was well understood by the framers of the constitution. It is true, that the money power, trusts and corporate greed were yet in their infancy. They did not have their armies of trained lobbyists; the art of electing men to office who would serve them faithfully had not been practiced.

The learned judge insists that a republican government must be such a government as "come up to the standard of such a form of government as understood at the time of the adopting of the federal constitution." And says that the Supreme Court of the United States interpret it in that light. Very well, let us see how our forefathers have construed the constitution. In the New England states at the time of the adoption of the constitution and ever since they have their township meetings in which matters relating to the local government and laws of such township are submitted to a direct vote of the people. In Massachusetts, in all cities and towns of twelve thousand inhabitants or less, the people assemble and vote directly upon the enactment of laws for their local government. If these practices were in direct violation of the constitution, why were they then tolerated? Why have they ever since been tolerated? Shall we say that the delegates and people of these different states were ignorant of the subject they were voting upon when they adopted this clause of the constitution, or shall we say that such a construction was never intended by its framers? We can not believe that the delegates and people of these states either in letter or in spirit have knowingly or will fully trampled under foot any of the principles of the constitution. These patriots have too many glorious records in the heroic struggle of Independence to be attainted with such a treasonable charge. Descendants of that little band from the Mayflower, Green Mountain Boys, Warren, Putnam, Prescott, Stark, Knowlton, Brooks, Patriots of Bunker Hill, Trenton, Monmouth, Yorktown, Camden, Bennington, Sartoga, and the many other places where you bled in the defense of your country, lie still in thy graves and rest on in peace for this great American Nation which thou hast reared will never permit your noble records to be stained with such charges.

Now keeping in mind the fact that there did exis a desire of a considerable number of persons in this country to centralize the government and to abolish state governments and to create monarchical form of government, it appears to us at least that this was

the mischief which the framers of our constitutian desired a safeguard against. That they wished a protection against changing our government into a monarchy, in case persons of such tendencies should get into control. We believe that this was the sole cause which this clause was intended to guard against; and if so, we cannot see any reason in the present case for limiting the general meaning and understanding of a republican government, viz.: "A government by the people, in contradistinction to government over the people, as all European governments at the time of the adoption of the constitution were. The vital point is, where the source of power? If in the whole people, then the government is republican, which includes democratic. Republican seems to be the more general term, including the other, but the difference, if any, is one of form, not of substance. In fact, every government has to act more or less through representatives; and the legal maxim applies, what one does through another he does himself." Thomas Paine, an author famous for his connection with both the American revolution and with the French revolution and also with his advocacy of infidel opinions, and who was chosen by Napoleon to introduce a popular form of government into Britain, after Napoleon should have invaded and conquered the island, speaking of what constitutes a republican government, says: "What is called a republic is not any particular form of government. It is wholly characteristic of the purport, matter or object for which government ought to be instituted, and on which it is to be employed." * * * "It is not necessarily connected with any particular form." In Scott's Woodstock, he says: "Theoretical politics had long inclined him to espouse the opinion of Harrington and others who adopted the visionary idea of establishing a pure democratical republic in so extensive a country as Britain." Emerson in his essay on Politics, calls our government a democracy. He quotes Fisher Ames: "A republic is a raft, which would never sink, but then your feet are always in water!" Will the learned judge deny that there is such a book as DeTocqueville on "Democracy in America," because we do not have a government which is democratical in any respect and because such a government which is wholly contrary to the principles and express provision of our constitution?

We cannot believe that the framers of this memorable document, of which every American holds the greatest reverence, had in mind or believed that the people were dangerous to themselves or to anything else that tended toward good government; or that they should be restricted in the exercise of enacting good and wholesome laws for the government of their particular states or that they should be shorn of the right to control their representatives when they misrepresented them, or to reject laws passed by their representatives contrary to their best interests. Our forefathers surely did not desire to tie the hands of the people and make them slaves to large corporate interests who thwart legislation by powerful lobbies with vast sums of money to corrupt the peoples representatives. Our forefathers did not have any reason for wresting this power from the people and making the representatives their perpetual guardians. And, therefore, we most earnestly contend that the "initiative and referendum amendment" is not in conflict either in letter or in spirit with the constitution either because the people are given the power to reject laws enacted by their representatives, or to directly enact laws themselves.

They are just, let the people rule, "the voice of the people is the voice of God." Let not the people be forever enslaved because the individual frailities and weaknesses of our representatives permit them to be corrupted and made hirelings of trusts and aggregated monopolies. Let not the avarice, greed and wealth obtained by monopoly and corruption which caused proud Rome to decay, crumble and fall, take hold of our fair country. Let not the rights of man be surrendered and liberty banished from among us, but let the words of that martyred president, the immortal Lincoln, sink deep into our hearts, "that this nation, under God, shall have a new birth of freedom; and that government of the people, by the people and for the people shall not perish from the earth."—*Oregon Law School Journal.*

HUMOR OF THE LAW.

"Gentlemen," said a judge, addressing the jury in a recent case, "you have heard the evidence. The indictment says the prisoner was arrested for stealing a pig. The offence seems to be becoming a common one. The time has come when it must be put a stop to, otherwise, gentleman, none of you will be safe."

An old judge in England, who, according to the common practice in that country, carried with him on his journeys a portable bath-tub for the usual morning ablutions, on one of his travels, neglected to take it. On arriving home he found it had been used which aroused his indignation. Calling the maid of the house he inquired who had used his tub.

"I did m' lord," the girl replied, and hung her head. The old judge's manner softened.

"Mary" he said, "I do not so much mind your using the tub, but I much regret that you should have done something behind my back which you would not do before my face."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Dismissal.—That plaintiff sued orignally in the United States court, and dismissed her action without prejudice, held no bar to a subsequent suit on the same cause of action in the state court.—Chesapeake & O. Ry. Co. v. Riddle's Admx., Ky., 62 S. W. Rep. 22.

2. ADMIRALTY — Bringing in New Defendants. — The principle of admiralty rule 59 will be applied by analogy to other than collision cases, by permitting the bringing in of any additional defendant who may be liable in whole or in part for the claim sued on.—Dailey v. City of New York, U. S. D. C., S. D. N. Y., 119 Fed. Rep. 1005.

3. ADMIRALTY—Libel by Master.—A master of a vessel, as libelant, cannot recover damages for loss to the owners from the cancellation of a charter party, where the libel does not claim damages therefor, or mention the charter party.—Harrison v. Hughes, U. S. D. C. D. Del., 119 Fed. Rep. 997.

4. ADOPTION—Indian.—That an Indian during a portion of his childhood lived in the family of another Indian held to raise no presumption that the former was adopted son of the latter.—Henry v. Taylor, S. Dak., 98 N. W. Rep. 641.

5. ADVERSE POSSESSION— Action to Quiet Title.— Occasional entries on land and occasional cutting of timber held insufficient to set limitations in motion, so as to give the entrymen title by adverse possession. — Combs v. Combs, Ky., 72 S. W. Rep. 8.

6. ADVERSE POSSESSION—Presumption.—A deed raises no presumption that an actual possession of the land which the grantee is shown to have held at a later date commenced at the date of its delivery. — Stockley v. Cissna, U. S. C. C. of App., Sixth Circuit, 119 Fed. Rep. 812.

7. ADVERSE POSSESSION—Taxation.— Where a tax sale is void for insufficiency of description, the title acquired cannot serve a basis for prescription. — Cooper v. Falk, La., 33 So. Rep. 567.

8. APPEAL AND ERROR—Objections to Depositions.— It is too late on appeal to object to depositions as taken without notice.—Hall v. Metcalf, Ky., 72 S. W. Rep. 18.

9. APPEAL AND ERROR—Review.— The supreme court will not reverse a trial court for refusing to direct a verdict —Woodson v. Holmes, Ga., 43 S. E. Rep. 467.

10. APPEARANCE — Waiver of Venue. — The filing of a demurrer and general denial constitutes a waiver of all questions of venue. — Galveston, H. & S. A. Ry. Co. v. Baumgarten, Tex., 72 S. W. Rep. 78.

11. ARBITRATION AND AWARD — Conclusiveness.— On submission of a dispute to arbitration, the decision of the arbitrator is not conclusive in cases involving calculations and measurements, unless the agreement of submission contains a stipulation to that effect, or such an intention is fairly inferred therefrom. — Nelson v. Charles Betcher Lumber Co., Minn., 93 N. W. Rep. 661.

12. ASSIGNMENTS—Ownership of Premises.—Owner of premises held not entitled to recover in an action for money had and received by defendant, who wrongfully leased the premises to a tenant and received rent from him.—Sherman v. Spalding, Mich., 98 N. W. Rep. 613.

13. ASSOCIATIONS — Property Rights. — The rights of membership in a general voluntary association evidenced by a charter are not property rights.—O'Brien v. Musical Mut. Protective & Benevolent Union, Local No. 14, Nat. League of Musicians, N. J., 54 Atl. Rep. 150.

14. ASSUMPSIT, ACTION OF—Executed Contract.—When a contract has been fully executed, and nothing remains to be done but the payment of the price agreed on, plaintiff may declare on the common counts in *indebitatus assumpsit*. — McDermott v. St. Wilhelmina Benev. Aid Soc., R. I., 54 Atl. Rep. 58.

15. ASSUMPSIT, ACTION OF — Limitation by Specification.—In an action in *assumpsit* on a debt evidenced by promissory notes, in which plaintiff's specification was restricted to a recovery on the debt itself, independently of the notes, plaintiff's right to recovery held limited by his specification. —Aseltine v. Perry, Vt., 54 Atl. Rep. 190.

16. ASSUMPSIT, ACTION OF—Pleading.—Where a plaintiff declares on a special contract, and establishes the same by evidence, he cannot abandon such contract and recover on the common counts. — Burton v. Rosemary Mfg. Co., N. Car., 43 S. E. Rep. 480.

17. BANKRUPTCY—Adverse Claimant. — A bank, which received money on deposit, to be prorated between the creditors of a partnership, holds the same in a fiduciary capacity, and cannot assert an adverse claim thereto after the partnership has been adjudged bankrupt.—*In re* Davis, U. S. D. C., N. D. Tex., 119 Fed. Rep. 950.

18. BANKRUPTCY—Appointment of Receiver.— Obtaining the appointment of a receiver by an insolvent partnership through dissolution proceedings in a state court, though such action was taken for the purpose of preventing the bankruptcy court from obtaining possession of the assets, is not an act of bankruptcy, under Bankr. Act 1898, § 3a, cl. 1. U. S. Comp. St. 1901, p. 3422. — *In re* Varick Bank, U. S. D. C., S. D. N. Y , 119 Fed. Rep. 921.

19. BANKRUPTCY — Complying with Rules.— Amounts paid out by a trustee in bankruptcy, otherwise than in the manner prescribed by the orders in bankruptcy and the rules of court, will not be allowed in the settlement of the estate.—*In re* Hoyt, U. S. D. C., E. D. N. Car., 119 Fed. Rep. 987.

20. BANKRUPTCY—Contempt.—A federal district court, sitting as a court of bankruptcy, has jurisdiction to proceed against a bankrupt for contempt, where he has failed to turn over all his property to the trustee. — *In re* Shachter, U. S. D C., N. D. Ga., 119 Fed. Rep. 1010.

21. BANKRUPTCY — Exemptions. — The property and allowances awarded a widow by Rev. St. Ohio, §§ 6038-6040, are in lieu of the exemptions the husband in bankruptcy proceedings would be entitled to from the bankrupt estate in case he had lived. — *In re* Parschen, U. S. C. C., N. D. Ohio, 119 Fed. Rep. 976.

22. BANKRUPTCY—Fraudulent Conveyance.—A trustee n bankruptcy can sue to set aside a fraudulent conveyance, where the estate of the judgment debtor is in the bankrupt court and the claim has been filed. — Schmitt v. Dahl, Minn., 98 N. W. Rep. 665.

23. BANKRUPTCY—Preference.—Conveyance by a bankrupt to a *bona fide* creditor for a precedent debt intended as a preference held not void as a fraud on creditors, under Bankr. Act, § 67, par. e U. S. Comp St. 1901, p. 3449. —Congleton v. Schreihofer, N. J., 54 Atl. Rep. 144.

24. BANKRUPTCY—Preference.— Under Bankr. Act, § 3, cl. 3, U. S. Compt. St. 1901, p. 3422, where an insolvent corporation fails to cause a preference by legal proceedings obtained by one creditor to be discharged, it commits an act of bankruptcy. — White v. Bradley Timber Co., U. S. D. C., S. D. Ala., 119 Fed. Rep. 989.

25. BANKRUPTCY—Prior Levy.—Where, prior to the adjudicated bankruptcy of a judgment debtor, possession of property was acquired by a levy under an execution issued out of a state court, the referee could not enjoin further proceedings to enforce the judgment.—White v. Thompson, U. S. C. C. of App., Fifth Circuit, 119 Fed. Rep. 868.

26. BANKRUPTCY—Property Vesting in Trustee. — The trustee in a bankrupt has no equitable standing to enjoin the removal from a building of a steam engine which the bankrupt had not paid for, nor acquired the legal title to, without an offer to pay to the owner the unpaid purchase price. — *In re* Smith, U. S. D. C., D. R. I., 119 Fed. Rep. 1004.

27. BANKS AND BANKING — Notice.—Notice given a director of a banking corporation held not binding on the company, where obtained through general channels and not communicated to associates in the management.— Black v. First Nat. Bank, Md., 54 Atl. Rep. 88.

28. BENEFIT SOCIETIES—Medical Officer.—Voluntary association held estopped to plead irregularity in election of its medical officer, in action by him for compensation. —McDermott v. St. Wilhelmina Benev. Aid Soc. R. I., 54 Atl. Rep. 58.

29. BENEFIT SOCIETIES—Sunday.—A member of a mutual benefit association can be expelled at a meeting on Sunday.—Pepin v. Societe St. Jean Baptiste, R. I., 54 Atl. Rep. 47.

30. BILLS AND NOTES—Consideration.—Where a person gives his note as a subscription to a college, based on a sufficient consideration, it is not revoked by his death.—Albert Lea College v. Brown's Estate, Minn., 93 N. W. Rep. 672.

31. BILLS AND NOTES — Parol Agreement. — Recovery by an endorsee of a note, as against the maker, could not be defeated by showing an agreement between the original parties that the same was not to be negotiated, whether the agreement was written or oral.—Black v. First Nat. Bank, Md., 54 At . Rep. 88.

32. BILLS AND NOTES—Parol Evidence.— Where, after the execution of a note, a third person signs his name upon the back of it, in blank, the obligation assumed by him may be shown by parol.— Lyndon Sav. Bank v. International Co., Vt., 54 Alt. Rep. 191.

33. BOUNDARIES— Re-Establishment.—In re-establishing a boundary line, in case of a discrepancy between the measurements and natural monuments, the latter control.—Hall v. Caplis, La., 33 So. Rep. 570.

34. CARRIERS—Contract of Shipment.—A railway company, limiting its liability to its own line in a contract of shipment, is liable for the negligence of its agent in billing the property to a wrong place on the connecting carrier's line.—Gulf, C. & S. F. Ry. Co. v. Harris, Tex., 72 S. W. Rep. 71.

35. CARRIERS— Erroneous Delivery. — Railroad company, erroneously delivering wheat to another than the consignee, held immediately liable to the consignor for the value of the wheat. — Missouri, K. & T. Ry. Co. of Texas v. Seley, Tex., 72 S. W. Rep. 89.

36. CARRIERS — Injury to Passenger. — A passenger transported in a freight car held not guilty of contributory negligence in failing to leave the car while it was being switched in the yard at a junction point, during which he was injured. — Texas & P. Ry. Co. v. Adams, Tex., 72 S. W. Rep. 81.

37. CARRIERS—Live Stock. — In an action for injury to stock in shipment, a charge should be given relieving defendant from liability if the injuries were occasioned by the inherent viciousness of the stock.— International & G. N. R. Co. v. Young, Tex., 72 S. W. Rep. 68.

38. CARRIERS—Negligence.—Where a railway company has its freight platform so constructed that the elbow of a passenger resting on the window sill of a passenger car is struck by the freight on the platform, it constitutes gross negligence. — Kird v. New Orleans & N. W. Ry. Co., La., 33 So. Rep. 587.

39. CHAMPERTY AND MAINTENANCE—Trespass.—A purchase of land at auction held not champertous as to one entering after sale. — Percifull v. Coleman, Ky., 72 S. W. Rep. 29.

40. CONSTITUTIONAL LAW — Bridges. — Code 1892, § 3555, held not unconstitutional, as depriving a railroad previously constructed of its property without due process of law, in compelling the erection of bridges over newly constructed highway. — Illinois Cent. R. Co. v. Copiah County, Miss., 33 So. Rep. 502.

41. CONTRACTS — Money Paid. — Voluntary payment by plaintiff of a judgment recovered against defendant by a third party would constitute a sufficient consideration for a subsequent promise by defendant to repay the amount paid.—Wright v. Farmers' Nat. Bank, Tex., 72 S. W. Rep. 103.

42. COPYRIGHTS — Series of Photographs. — A series of photographs arranged for use in a machine for producing a panoramic effect are not entitled to registry and protection by copyright as a "photograph," under Rev. St. § 4952, U. S. Comp. St. 1901, p. 3406. — Edison v. Lubin, U. S. C. C., E. D. Pa., 119 Fed. Rep. 993.

43. CORPORATIONS — Indorsement. — Where, after maturity of a note made by a corporation, an officer thereof indorsed it, the question as to the understanding of the parties at the time was for the jury.—Lyndon Sav. Bank v. International Co., Vt., 54 Atl. Rep. 191.

44. CORPORATIONS — Interested Director. — A contract entered into by a corporation, in which one of the directors is interested, is voidable, but may be subsequently ratified by the stockholders. — Hodge v. United States Steel Corp., N. J., 54 Atl. Rep. 1.

45. CORPORATIONS — Right to Sue.—A foreign corporation, organized to obtain the benefit of less rigorous laws than those of Kentucky, held nevertheless entitled to sue in Kentucky. — Cumberland Telephone & Telegraph Co. v. Louisville Home Tel. Co., Ky., 72 S. W. Rep. 4.

46. CORPORATIONS — Sale of Stock. — Purchaser of corporate stock from subscriber held entitled to mandatory injunction to compel issuance, notwithstanding Code, § 844, as amended by Acts 1894, p. 46. — Scherk v. Montgomery, Miss., 33 So. Rep. 507.

47. CRIMINAL EVIDENCE — Expert Testimony. — On prosecution for murder, held competent for state's medical expert to illustrate thickness of deceased's skull, and testify as to where the skull is generally fractured when the body falls and strikes on the head. — State v. Greenleaf, N. H., 54 Atl. Rep. 38.

48. CRIMINAL EVIDENCE—Good Character.—Proof that accused has borne a good character is to be considered by the jury, but in connection with all other pertinent evidence tending to establish his guilt or innocence.— Brazil v. State, Ga., 43 S. E. Rep. 460.

49. CRIMINAL LAW — Incest.—An act is denounced as a crime when the law declares it to be such and provides a punishment for it. — State v. De Hart, La., 33 So. Rep. 605.

50. CRIMINAL LAW — Testimony of Accomplice. — The trial judge should instruct the jury to observe caution in considering the evidence of an accomplice; but the application of this rule is within the reasonable discretion of the court.—State v. De Hart, La., 33 So. Rep. 605.

51. CRIMINAL TRIAL — Continuance. — In a prosecution for murder, where a necessary witness is sick with smallpox, a continuance should be granted.—Watson v. State, Miss., 33 So. Rep. 491.

52. CRIMINAL TRIAL — Prejudicial Error. — Acts of an assistant prosecutor in repeatedly asking the son of the accused, on cross-examination, if he had not stated that he suspected his father of having committed similar offenses, held reversible error. — State v. Irwin, Idaho, 71 Pac. Rep. 608.

53. CRIMINAL TRIAL — Reading Testimony to Jury. —It was not error for the court, in granting the jury's request that the direct testimony of two witnesses be read to them, to refuse respondent's request that the cross-examination be read also. — State v. Manning, Vt., 54 Atl. Rep. 181.

54. DAMAGES — Injury to Reputation. — It was competent to prove the bad character of persons residing in the same house with a party asking damages for injury to his general reputation. — Collins v. Clark, Tex., 72 S. W. Rep. 97.

55. DAMAGES—Punishment.—Exemplary damages held not to permit damages for the purpose of punishment.— McChesney v. Wilson, Mich., 93 N. W. Rep. 627.

56. DEATH — Illegitimate Child. — The mother of an illegitimate child has no right of action for his negligent homicide, under Civ. Code, § 3828. — Robinson v. Georgia R. & Banking Co., Ga., 43 S. E. Rep. 452.

57. DEDICATION — Right to Open Street. — A city held estopped to open the streets in an addition which had been used for the erection of buildings and for agricul

tural purposes for more than 30 years. — Schooling v. City of Harrisburg, Oreg., 71 Pac. Rep. 605.

58. DEPOSITIONS.—Refusal to Appear. — Where a commission was sent to the proper officer, and the witness refused to testify, as there are ample means to compel such witness to testify, proof of his refusal was correctly excluded.—Bernard v. Guidry, La., 33 So. Rep. 558.

59. DIVORCE — Marriage Pending Appeal.—A party to a divorce suit, by marrying pending appeal from the decree granting a divorce, loses right to be heard on appeal, or to a remand for new trial, on reversal. — Branch v. Branch, Colo., 71 Pac. Rep. 632.

60. DIVORCE—Separation.—Where a separation occurs because of a husband's conduct, on his failure to reform and within two years to seek out his wife and apply to return, a divorce for desertion is proper. — Jerolaman v. Jerolaman, N. J., 54 Atl. Rep. 166.

61. EJECTMENT — Legal Title. — Under the law of Tennessee, a plaintiff cannot recover in ejectment without showing a perfect legal title, either by deraignment or by actual adverse possession under color of title for the full term of seven years. — Stockley v. Cissna, U. S. C. C. of App., Sixth Circuit, 119 Fed. Rep. 812.

62. EMINENT DOMAIN — Erection of Dam.—Where one desires to erect a dam to generate electricity for a railroad, held, that power of eminent domain could not be invoked on the ground of public use.—Avery v. Vermont Electric Co., Vt., 54 Atl. Rep. 179.

63. EMINENT DOMAIN — Irregation Ditch. — Injunction is the proper remedy to prevent one without authority from crossing the canal of an irregation company with a lateral.—Castle Rock Irregation, Canal & Water Power Co. v. Jurisch, Neb., 93 N. W. Rep. 690.

64. EMINENT DOMAIN — Temporary Injuries.— Where a property owner was specially damaged by a railroad in a street, he was not debarred from recovering because the injury continued only during the construction.— Bailey v. Boston & P. R. Corp., Mass., 66 N. E. Rep. 203.

65. EMINENT DOMAIN — Water Company. — The capitalization of income, even at reasonable rates, cannot be adopted as a sufficient or satisfactory test of the present value of a water plant, but may properly be considered in determining such value. — Kennebec Water Dist. v. City of Waterville, Me., 54 Atl. Rep. 6.

66. EQUITY—Multifarious Bill.—A bill by the heirs of a husband and wife to recover lands is not multifarious because the title to some of the lands was vested in the husband, to some in the wife, and to some in both, nor because defendants claim through various sources of title.— Kilgore v. Norman, U. S. C. C., S. D. Ga., 119 Fed. Rep. 1006.

67. ESTOPPEL — Partition. — A ward held, under the facts, not equitably entitled to object that the probate court had no jurisdiction to partition land. — Greer v. Ford, Tex., 72 S. W. Rep. 73.

68. ESTOPPEL — Resulting Trust. — A grantor by warranty deed of lands impressed in the grantees hands with a resulting trust is not estopped by his warranty from acquiring the interest of the *cestui que trust*. — Condit v. Bigalow, N. J., 54 Atl. Rep. 160.

69. EVIDENCE—Hearsay. — Answer of a physician that he believed plaintiff's injuries to have been caused by violence held not objectional as resting on hearsay.— Galveston, H. & S. A. Ry. Co. v. Baumgarten, Tex., 72 S. W. Rep. 78.

70. EXECUTORS AND ADMINISTRATORS — Attorney's Fees.—Fees to attorneys of mortgagee and administrator held improperly allowed in foreclosure of decedent's realty.—Hall v. Metcalf, Ky., 72 S. W. Rep. 18.

71. EXECUTORS AND ADMINISTRATORS—Collusion.—In an action by a creditor, suing the administratrix and the county judge for an accounting, a petition which alleges collusion between the defendants and payment of illegal fees held sufficient as against a demurrer.—McGlave v. Fitzgerald, Neb., 93 N. W. Rep. 692.

72. EXECUTORS AND ADMINISTRATORS — Payment of Legacies.—A provision authorizing executors to pay legacies as they might find it convenient held not to confer power on them to arbitrarily delay payment.— Savin v. Webb, Md., 54 Atl. Rep. 64.

73. EXECUTORS AND ADMINISTRATORS—Rents.—Rents accruing after the death of a decedent, and before the exercise of a power of sale, go with the title of the land to the heir or devisee, and not to the executor or to the purchaser under the power. — Bittle v. Clement, N. J., 54 Atl. Rep. 138.

74. EXEMPTIONS—Attachment.—Where an action was brought against a non-resident in New York, and a debt due him there was attached, he was not entitled to set up in that action a claim to a personal property exemption.—Sexton v. Phœnix Ins. Co., N. Car., 43 S. E. Rep. 479.

75. EXEMPTIONS—Fraudulent Concealment.—Concealment of part of his personal property by defendant in attachment as a preliminary to claiming his exemption will, where the property remains concealed, be treated as a selection *pro tanto* of the exemption. — Florida Loan & Trust Co. v. Crabb, Fla., 33 So. Rep. 528.

76. EXPLOSIVES — Liability for Explosion. — A manufacturer of fuse held not liable for explosion of powder; the business, when commenced, being in a proper place, care being used, and a stranger having willfully blown up the magazine. — Kleebauer v. Western Fuse & Explosives Co., Cal., 71 Pac. Rep. 617.

77. FEDERAL COURTS— Bill of Exceptions.—The settlement of a bill of exceptions in a federal court is governed by the federal statutes and practice, and not by the statutes or practice of the states.— Green v. Fitchburg R. Co., U. S. C. C. of App., First Circuit, 119 Fed. Rep. 872.

78. FEDERAL COURTS—Jurisdiction. — In an action at law plaintiff cannot give a federal court jurisdiction, on the ground that the action is one arising under the constitution or laws of the United States, by alleging facts which are properly matters of defense and not necessary to a statement of his cause of action. — Filhiol v. Torney, U. S. C. C., E. D. Ark., 119 Fed. Rep. 974.

79. FIRE INSURANCE—Increase of Hazard.— Where insurance agent had knowledge of the facts, the company was estopped to assert a forfeiture for breach of an iron-safe clause and for any increase of the hazard by a lease of part of premises.—Phœnix Ins. Co. v. Randle, Miss., 33 So. Rep. 500.

80. FIRE INSURANCE — Non-Payment of Premium. — Sickness held no excuse for non-payment of premium as provided by fire policy. — Home Ins. Co. v. Wood, Ky., 72 S. W. Rep. 15.

81. FIRE INSURANCE—Return of Premium. — Where an insurance company claimed that a policy was void for breach of a condition against other insurance, but failed to return any part of the unearned premium, it was liable for the loss sustained. — Mississippi Fire Assn. v. Dobbins, Miss., 33 So. Rep. 506.

82. FORGERY—Indictment.—An indictment for forgery is not fatally defective, in that it fails to allege an intent to defraud any particular person.— Brazil v. State, Ga., 43 S. E. Rep. 460.

83. FRAUDS, STATUTE OF—Memorandum.— Instrument purporting to leave certain realty to one to whom it had been given by parol held a sufficient memorandum in writing within the statute of frauds.— Shroyer v. Smith, Pa., 54 Atl. Rep. 24.

84. FRAUDS, STATUTE OF — Specific Performance.—A contract to convey a third of all one's property held to sufficiently describe the property to satisfy the statute of frauds.—Moayon v. Moayon, Ky., 72 S. W. Rep. 33.

85. FRAUDULENT CONVEYANCES—Real Estate in Wife's Name.—Real estate purchased by a debtor in his wife's name, or paid for with his money, may be subjected in equity to levy in satisfaction of his antecedent debts.— Florida Loan & Trust Co. v. Crabb, Fla., 33 So. Rep. 523.

86. FRAUDULENT CONVEYANCES—Setting Aside.—In an action to set aside a conveyance as fraudulent, it is necessary to prove that the claim on which the judgment was based existed before the conveyance.— Schmitt v. Dahl, Minn., 93 N. W. Rep. 665.

87. GARNISHMENT— Proceeds of Policy. — An attachment of a debt due from an insurance company by virtue of a fire loss held not invalid, because the levy was made before adjustment of the loss. – Sexton v. Phœnix Ins. Co., N. Car., 48 S. E. Rep. 479.

88. GAS—Negligence.—A gas company held not guilty of negligence in failing to notify plaintiff, or to see that all the gas jets were turned off, when the gas was turned on again after repairs. — Skoglund v. St. Paul Gaslight Co., Minn., 93 N W. Rep. 668.

89. GUARDIAN AND WARD—Final Settlement — In a bill by a ward against his former guardian to impeach a final settlement, an allegation that the ward's consent was obtained by fraud held not to constitute a direct attack upon the validity of a decree approving the final settlement.—Scoville v. Brock, Vt., 54 Atl. Rep. 177.

90. HOMESTEAD—Head of Family. — A person supporting his widowed mother and single sister, and living with them on a farm, is entitled to the statutory homestead rights.—Baldwin v. Thomas, Ark., 72 S. W. Rep. 53.

91. HOMESTEAD—Head of Family.—Where all the children have arrived at majority and permanently departed from the home of their father, and the mother dies, leaving the father alone, he is no longer a head of a family, within the constitutional provision exempting homesteads.—Herrin v. Brown, Fla., 33 So. Rep 522.

92. HUSBAND AND WIFE—Curtesy — A husband has an equity in lands to which his wife holds title, and, if a child be born during coverature and the husband survives the wife, he will take an estate by curtesy. — Bristol v. Skerry, N. J., 54 Atl. Rep. 135.

93. HUSBAND AND WIFE -- Divorce.— The forgiving of the husband by the wife having a ground for divorce held sufficient consideration for his contract to convey. —Moayon v. Moayon, Ky., 72 S. W. Rep. 33.

94. HUSBAND AND WIFE— Family Expenses.—The Illinois statute making both husband and wife liable for the family expenses held not to impose any liability on the wife which will be enforced by the courts of other states for purposes made by the husband without her knowledge while they were temporarily in Illinois. — Mandell Bros. v. Fogg, Mass., 66 N. E. Rep. 198.

95. HUSBAND AND WIFE — Separate Property. — The burden of proof is on the holder of a note signed by a married woman to show that she intended to bind her separate estate.—Farmers' Bank v. Boyd, Neb., 93 N. W. Rep. 676.

96. INCEST — Evidence. — On trial for incest, to prove previous guilty acts with other men is no defense.— State v. DeHart, La., 33 So. Rep. 605.

97. INTOXICATING LIQUORS — Acts of Employer. —In a prosecution for keeping liquor with intent to sell the same illegally, defendant's request that he could not be convicted, if the keeping and sales were by his servants contrary to his instructions, held properly refused.— Commonwealth v. Coughlin, Mass., 66 N. E. Rep. 207.

98. JUDGES—Malicious Abuse of Power.—An action for damages cannot be maintained against a judge of a court of record for oppressively, maliciously, and corruptly entering a decree of disbarment against plaintiff as an attorney.—Webb v. Fisher, Tenn , 72 S. W. Rep. 110.

99. JUDGMENT—After Death of Claimant.—A judgment for costs against one interposing a claim to property levied on under an execution against another held void, if rendered after the death of the claimant. — Bauer v. Wood, Ala., 33 So. Rep. 538.

100. JUDGMENT — Duress. — Where a person, arrested for obtaining money by extortion, returned the money and pleaded guilty, he cannot afterwards assert that such arrest amounted to duress—Coveney v. Phiscator, Mich., 93 N. W. Rep. 619.

101. JUDGMENT—Lien.—The failure of a judgment lien as to some of the parcels of realty sought to be affected does not destroy the lien as to other parcels.—Ives v. Beecher, Conn., 54 Atl Rep. 207.

102. LANDLORD AND TENANT—Construction of Lease.— Clause in a lease for a term of one year, "with privilege of longer," held too indefinite to give the lessee any right to retain the premises after the year.—Howard v. Tomicich, Miss., 33 So. Rep. 493.

103. LANDLORD AND TENANT— Possession. — The fact that at the commencement of the term another tenant is in rightful possession of the leased premises does not prevent the new lessee from recovering substantial damages. — Joseph Bernhard & Son v. Curtis Conn., 54 Atl. Rep. 213.

104. LANDLORD AND TENANT—Repairs—In the absence of a promise by a landlord to reimburse a tenant for repairs, the amount expended therefor cannot be recovered.—Riggs v. Gray, Tex., 72 S. W. Rep. 101.

105. LANDLORD AND TENANT— Rights of Tenant.— A tenant under an oral lease for one year, made before service of process in foreclosure, who enters into another lease pending suit, takes subject to any decree against his lessor.—McLean v. McCormick, Neb., 93 N. W. Rep. 697.

106. LANDLORD AND TENANT — What Constitutes. — Where a party contracts for the lease of a house, enters into possession, and pays a month's rent, it constitutes the relationship of landlord and tenant, though it was in contemplation that a written instrument should be signed —Coffee v. Smith, La., 33 So. Rep. 554.

107. LIBEL AND SLANDER — Letters of Defendant to Attorney.—Letters written by a person to the attorney of another, giving his version of a business transaction with his client, with the view of avoiding anticipated litigation, held to give no right of action for libel.—Coffee v. Smith, La., 33 So. Rep. 554.

108. LIFE INSURANCE — Receiver.— Where a receiver proved that directors of life insurance company had loaned the company's funds on insufficient security, he was not required to prove the value of the securities at the time of the loan.—New Haven Trust Co. v. Doherty, Conn , 54 Atl. Rep. 209.

109. LIMITATION OF ACTIONS— Acknowledgment.— A debtor's acknowledgment to pay a debt held not to be impaired by an express intention to discharge the obligation by a bounty under her will.— Gill v. Donovan, Md., 54 Atl. Rep. 117.

110. LIMITATION OF ACTIONS — Breech of Covenant. — The grantees in a warranty deed cannot claim that limitations to their right of action for breach of the covenants were suspended by an agreement between them and the grantor, which they violated —Bray v. Fletcher, Mich., 93 N. W. Rep. 624.

111. LIMITATION OF ACTIONS — Defective Sidewalks.— Limitations do not run against an action on a lot owner's liability over to a city for a judgment for injuries from a defective sidewalk until the city's liability is fixed.—City of Lincoln v. First Nat. Bank, Neb., 93 N. W. Rep. 698.

112. MALICIOUS PROSECUTION—Probable Cause.— The fact that a person has been acquitted of a criminal charge does not tend to prove a want of probable cause for the prosecution, on a suit for malicious prosecution. —Bekkeland v. Lyons, Tex., 72 S. W. Rep. 56.

113. MANDAMUS—Telephone Company. — Where a telephone company refuses a subscriber access to its exchange when he is properly entitled thereto, his right to such access may be enforced by *mandamus*. — Mahan v. Michigan Tel. Co., Mich., 93 N. W. Rep. 629.

114. MARRIAGE — Illicit Cohabitation. — No presumption of marriage can arise from cohabitation, where the relation was illicit in its origin, unless a subsequent mutual marriage contract is shown. — Henry v. Taylor, S. Dak., 93 N. W. Rep. 641.

115. MASTER AND SERVANT— Assumed Risk.—Seaman, whose death was occasioned by tipping of plank swung from side of vessel, held not to have assumed risk.—Rick v. Saginaw Bay Towling Co., Mich , 93 N. W. Rep 632.

116. MASTER AND SERVANT — Contract — Where a person employs two to do certain work, with the right to discharge them at will, he may discharge one and retain the other in his employ. — Leonard v. Sparks, La., 33 So. Rep. 594.

117. MASTER AND SERVANT — Fellow Servant. — A person who, under the direction of the superintendent, erects the "hanger" in a mill on which a pulley shaft is placed, is not, while doing such work, a fellow-servant of an operative in the mill. — Crandall v. Stafford Mfg. Co., R. I., 54 Atl. Rep. 52.

118. MASTER AND SERVANT — Flagman. — A flagman, killed while endeavoring to warn pedestrians crossing the track of their danger, held not guilty of contributory negligence, barring recovery. — Missouri, K. & T. Ry. Co. of Texas v. Goss, Tex., 72 S. W. Rep. 94.

119. MASTER AND SERVANT — Latent Defects.—Where a railroad company purchases a telephone line, it is not liable to a lineman, injured by the fall of a telephone pole through a latent defect therein, which the master by ordinary care had not discovered. — Atlantic & B. R. Co. v. Reynolds, Ga., 43 S. E. Rep. 456.

120. MILITIA—Constitutional Law.—Laws 1899, ch. 4684, § 27, requiring the county commissioners in each county in which there is a company or battery of state troops to provide such company or battery with an armory, is unconstitutional. — State v. Dickenson, Fla., 33 So. Rep. 514.

121. MINES AND MINING — Liens.—Where the holder of a lien on mining property on which there was a concurrent lien, purchased the property, it should be ordered to be sold and the proceeds applied to the respective liens *pro rata*. — M. C. Bullock Mfg. Co. v. Sunday Lake Iron Min. Co., Mich., 93 N. W. Rep. 611.

122. MONOPOLIES—Injunction Against Infringement.—That a complainant is a member of a combination in violation of the anti-trnst law of July 2, 1890, U. S. Comp. St. 1901, p. 3200, does not give third persons the right to infringe a patent of which complainant is owner, nor preclude complainant from maintaining a suit in equity to enjoin such infringement. — General Electric Co. v. Wise, U. S. C. C., N. D. N. Y., 119 Fed. Rep. 922.

123. MONOPOLIES — Voluntary Association.—One of the objects of a voluntary association of musicians being an unjustifiable interference with freedom of contract and trade, the courts will not interfere to compel a continuance of membership. — O'Brien v. Musical Mut. Protective & Benevolent Union, Local No. 14, Nat. League of Musicians, N. J., 54 Atl. Rep. 150.

124. MORTGAGES — Appraisement — An appraisement on foreclosure at $4,500 will not be set aside as insufficient, where the mortgagor files six affidavits establishing the valuation at about $6,300. — Bird v. McCreary, Neb., 93 N. W. Rep. 684.

125. MORTGAGES — Contract of Assumption. — Where land was conveyed to defendant for the convenience of a third party, and defendant had no knowledge of a clause assuming a mortgage on the land, held, she was not liable under such covenant of assumption. — Gill v. Robertson, Colo., 71 Pac. Rep. 634.

126. MORTGAGES — Discharge of Mortgagor. — Where the grantee of mortgaged property agreed to pay the same, and secured from the mortgagee an extension, the mortgagor was discharged. — Franklin Sav. Bank v. Cochrane, Mass., 66 N. E. Rep. 200.

127. MORTGAGES — Extension of Time.—An agreement by the purchaser of mortgaged premises to pay the debt does not render the mortgagors mere sureties, so that they are released from liability by a subsequent extension of time to the purchaser, unauthorized by them.—Iowa Loan & Trust Co. v. Haller, Iowa, 93 N. W. Rep. 636.

128. MORTGAGES— Firm Debts. — Mortgage by partners on firm property held superior to individual mortgages by the partners.—Harris v. Tuttle, Ky., 72 S. W. Rep. 16.

129. MORTGAGES—Sale by Mortgage.—Judgment creditor held not to have such interest that he can maintain *assumpsit* against mortgagee, who sells under power in mortgage and pays the surplus to the mortgagor.—Norman v. Halsey, N Car., 43 S. E. Rep. 473.

130. MUNICIPAL CORPORATIONS—Deed by Purchaser.—A quitclaim deed by a purchaser at foreclosure, pending appeal, entitles the grantee to a sheriff's deed executed on affirmance of the order.—McLean v. McCormick, Neb., 93 N. W. Rep. 697.

131. MUNICIPAL CORPORATIONS—Repair of Sidewalk.—The police power of a city having entire control of its streets and sidewalks is sufficient to enable it to cause the repair of a hole in a sidewalk. — Lentz v. City of Dallas, Tex., 72 S. W. Rep. 59.

132. MUNICIPAL CORPORATIONS—Sidewalks.—The proprietor of a hotel, who had stretched a carpet across a sidewalk, was bound to exercise care that travelers were not injured thereby. — Morris v. Whipple, Mass., 66 N. E. Rep. 199.

133. MUNICIPAL CORPORATIONS—Special Assessment.—Without an express statute authorizing it, an extension of a special assessment over a period of years is void.—Corliss v. Village of Highland Park., Mich., 93 N. W. Rep. 610.

134. NAVIGABLE WATERS — Effect of Reliction. — Land bounded by a navigable river, which is lost by erosion or submergence, is regained by the original owner of the fee when, by reliction or accretion, the water disappears and the land emerges. — Stockley v. Cissna, U. S. C. C. of App., Sixth Circuit, 119 Fed. Rep. 812.

135. NEW TRIAL—Conflict of Testimony.—Where there is a conflict of testimony between unimpeached witnesses on an issue, it is the province of the jury to determine such issue, and the court is not authorized to set aside their verdict, although it may believe the preponderance of evidence to be the other way.—Pringle v. Guild, U. S. C. C., D. S. Car., 119 Fed. Rep. 962.

136. NEW TRIAL — Jurisdiction to Grant. — Where an action has terminated by the expiration of the time for an appeal, the parties cannot, by a stipulation that a motion for a new trial may be heard, confer on the court jurisdiction to grant a new trial.—Bright v Juhl, S. Dak., 93 N. W. Rep. 648.

137. PARENT AND CHILD — Custody of Child. — Under P. L. 1902, p. 264, §§ 9, 12, where the welfare of children would be promoted by remaining with their mother, the fact that she is living separate from her husband, who ordered her to leave, is not such misconduct as should deprive her of their custody. — Carson v. Carson, N. J., 54 Atl. Rep. 149.

138. PARTNERSHIP—Accounting.—On an accounting of a distillery partnership, referred to a commissioner, the latter was authorized to accept the agreement of counsel as to the cost of the manufacture of the product.—McBrayer v. Hanks' Exrs., Ky., 72 S. W. Rep. 2.

139. PARTNERSHIP — Dissolution.—After dissolution of a commercial partnership, a partner not specially authorized cannot bind the others for an expensive lawsuit —Richard v. Mouton, La., 33 So. Rep. 563.

140. PRINCIPAL AND AGENT — Employment by Agent.—Account books of agent held inadmissible, in action by one employed by him against principal, to show payment of claim by agent, pleaded in defense.—McKeen v. Providence County Sav. Bank, R. I., 54 Atl. Rep. 49.

141. PRINCIPAL AND AGENT—Estoppel. — Plaintiff held not estopped to pursue principal, notwithstanding delay in presentment of claim and credit allowed agent by principal. — McKeen v. Providence County Sav. Bank, R. I., 54 Atl. Rep. 49.

142. PRINCIPAL AND SURETY — Building Contract. — Sureties on a building contract held released by a ma

terial change in the specifications without the sureties. consent.—Erfurth v. Stevenson, Ark., 72 S. W. Rep. 49.

143. PUBLIC LANDS — Occupancy in Good Faith. — Continuous occupation of public land with intent to acquire it under the homestead laws when surveyed, when begun prior to definite location by Northern Pacific Railway Company of its route, held a claim upon the land, within the meaning of Act Cong. July 2, 1864, ch. 217.— Nelson v. Northern Pac. Ry. Co., U. S. S. C., 23 Sup. Ct. Rep. 302.

144. QUIETING TITLE—Option to Purchase.—Defendant in an action to quiet title for failure to exercise option to purchase land, may disclaim, or deny default, and ask damages for non-performance. — Ullom v. Hughes, Pa., 54 Atl. Rep. 23.

145. RAILROADS—Sale of Tickets. — Failure of a carrier to keep its ticket office open 30 minutes before the departure of a passenger train, as required by statute, is negligence *per se*.—International & G. N. R. Co v. Lister, Tex., 72 S. W. Rep. 107.

146. SPECIFIC PERFORMANCE — Agreement to Convey. —A written agreement to convey a grain elevator, with the fixtures belonging thereto, at the option of the proposed vendee, will be specifically enforced in a proper cause.—Tidball v. Challburg, Neb., 93 N. W. Rep. 679

147. STATES — River Boundaries.—The sudden change in the channel of the Mississippi river, between the states of Tennessee and Arkansas, by a permanent cut-off made by the river during a flood, did not change the boundary between the states, which remained in the middle of the abandoned channel. — Stockley v. Cissna, U. S. C. C. of App., Sixth Circuit, 119 Fed. Rep. 812.

148. STATUTES—Repeal by Implication. — Statutes of a general nature do not repeal by implication special acts in favor of particular municipalities. — Commonwealth v. Summerville, Pa., 54 Atl. Rep. 27.

149. STREET RAILROADS — Contributory Negligence.— Traveler attempting to cross a double-track street railway immediately behind a passing car, giving no notice of his coming to a motorman on the other track, must be his own protector. — Schutt v. Shreveport Belt Ry. Co., La., 33 So. Rep 577.

150. SUBROGATION — Tender.—Where a surety endeavored to ascertain the exact amount due, and, failing, paid into court a sum in excess of the debt, interest, and costs, the tender was sufficient. — Snook v Munday, Md , 54 Atl. Rep. 77.

151. SUNDAY — Charitable Organization. — A mutual benefit association is a charitable organization, and can transact its business on Sunday. — Pepin v. Societe St. Jean Baptiste, R. I., 54 Atl. Rep. 47.

152. TAXATION — Assessment Roll.—Fraudulent reduction of valuation of one taxpayer's property as entered on assessment roll held, under Pub. Acts 1893, No. 206, § 76, to vitiate the entire tax.— Auditor General v. Hughitt, Mich., 93 N. W. Rep. 621.

153. TAXATION—Inheritance Tax.—A collateral inheritance tax held assessable only on the amount remaining after payment of all debts and expense of executing the will and of a contest thereof. — Shelton v. Campbell, Tenn., 72 S. W. Rep. 112.

154. TELEGRAPHS AND TELEPHONES—Franchise Rights. —A telephone company, purchasing the tangible property and franchise rights of another company, held bound by the contract obligations between the assignor and the city.—Mahan v. Michigan Tel. Co., Mich., 93 N. W. Rep. 629.

155. TENANCY IN COMMON — Vendor and Purchaser.— Authority given by special tenants in common to one of their number to deliver a deed held not to warrant him in making a contract with the vendee binding them to perform certain additional acts not provided for in the deed.—Gillham v. Walker, Ala., 33 So Rep 537.

156. TRADE-MARKS AND TRADE-NAMES—Infringement. —The Trade-mark "Grape-Nuts," adopted as the name of a cereal food preparation, is not infringed by the name "Grain Hearts," used to designate a similar product.— Postum Cereal Co. v. American Health Food Co., U. S. C. C. of App., Seventh Circuit, 119 Fed. Rep. 848.

157. TRIAL—Amendment.— Where counsel is addressing the jury, the court should not, after stopping the argument on the ground that there are no pleadings on which to base it, state that counsel might amend and then proceed with the argument. — Woodson v. Holmes, Ga., 43 S. E. Rep. 467.

158. TRUSTS—Advancement.— Where purchase money is paid by one, and a conveyance is taken in the name of another, whom the purchaser is under obligation to provide for, the presumption is that the conveyance was an advancement. — Bailey v. Dobbins, Neb., 93 N. W. Rep. 687.

159. USURY — Cancellation of Contract.—Parties to a usurious contract may cancel it by mutual consent, and make it the basis of a new contract to pay the money actually received, with legal interest. — Sanford v. Kunz, Idaho, 71 Pac. Rep. 612.

160. VENDOR AND PURCHASER — Contract of Sale. — That a tax deed under which the owner of property claimed was defective did not render his title unmarketable, where he had obtained a deed from the owner of the land.—Womack v. Coleman, Minn., 93 N. W. Rep. 663.

161. VENDOR AND PURCHASER— Defects in Title.—A vendee in possession under deed with covenants of warranty cannot unless there was fraud in the sale to him or his vendor is insolvent, defeat the collection of the purchase money for defects in the title. — Gilham v. Walker, Ala., 33 So. Rep. 537.

162. WAREHOUSEMEN — Loss of Property. — A cotton compress company, which lost cotton which had been delivered to it, held liable for the value at the time the loss was discovered. — Hattiesburg Compress Co. v. Johnson, Miss., 33 So. Rep. 654.

163. WEAPONS—Broken Pistol.—A pistol with a broken mainspring, but which could be fired, held within Cr. Code, § 4420, prohibiting the carrying of concealed weapons.—Fielding v. State, Ala., 33 So. Rep. 677.

164. WILLS—Contract for Services. — Where defendant contracted to make plaintiff his heir, and thereafter defendant's wife disinherited plaintiff by will, and defendant attempted to do the same, such acts constituted a breach of the contract, entitling plaintiff to recover the reasonable value of her services.— Clark v. West, Tex., 72 S. W. Rep. 100.

165. WITNESSES — Cross-Examination. — Questions to the son of the accused, on cross-examination, if he had not stated that he suspected his father of having commited similar offenses, held improper cross-examination.—State v. Irwin, Idaho, 71 Pac Rep 608.

166. WITNESSES — Dying Declaration. — Before the dying declarations of a child 10 years old can be admitted, proper ground must be laid as to his competency.—State v. Frazier, La., 33 So. Rep. 561.

167. WITNESSES — Evidence of Reputation.— Where a witness lives in one place, but works in another, a witness who knows his reputation in the neighborhood where he works is competent to testify as to his character.—Atlantic & B. R. Co. v. Reynolds, Ga., 43 S. E. Rep. 456.

168. WITNESSES—Impeachment.—Where a witness was not a party to a prior proceeding, the record thereof held not admissible to discredit his subsequent testimony.—Tourtellotte v. Brown, Colo , 71 Pac. Rep. 638.

169. WITNESSES — Refreshing Memory. — A witness may refresh his memory from a memorandum made by him from original memoranda which had been made by him or under his direction. — Welch v. Greene, R. I., 54 Atl. Rep. 54.

170. WORK AND LABOR — Special Contract. — Where evidence shows that defendant compelled plaintiff to abandon a special contract, an action of *assumpsit* can be maintained, without first demanding performance of the special contract.—Davis v. Streeter, Vt., 54 Atl. Rep. 185.